No. 90-481

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

601 PROPERTIES INC.,
Petitioner,

vs.

CITY OF DAYTON, OHIO,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals, Second Appellate District, Montgomery County, Ohio.

BRIEF OF RESPONDENT CITY OF DAYTON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. ANTHONY SAWYER
City Attorney
Counsel of Record

Steven R. Milby
Senior Attorney
101 West Third Street
P.O. Box 22
Dayton, Ohio 45401
Tel. (513) 443-4100
Fax. (513) 443-3628

Counsel for Respondent
City of Dayton, Ohio

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STATEMENT OF THE FACTS AND CASE

Because this case is concerned with the timely filing of a notice of appeal, the statements of the facts and case are combined herein to avoid repetition.

On March 14, 1988 an administrative notice of violation and order for compliance was issued to 601 Properties, Inc., (hereinafter "Petitioner") requiring the correction of violations of the City of Dayton's (hereinafter

"Respondent") non-residential building maintenance code.

On March 31, 1988, a written request for an appeal hearing before the Non-Residential Building Board of Appeals (hereinafter "Board") was served by the Petitioner upon the Respondent's division of Inspectional Services.

The hearing was held on July 7, 1988, at the close of which the Board affirmed the notice of violation and order for compliance.

The "Decision, Final Entry and Order" of the Board was issued in written form, and copies of it were mailed to interested persons on July 29, 1988 and August 9, 1988.

Certified mail return receipts indicate that, on August 1, 1988 and on August 13, 1988, copies of the Board's decisions were signed for and received by Michael J. Ellerbrock, counsel of record who had originally filed the notice of appeal on behalf of the Petitioner. This crucial fact is omitted from the Petitioner's Statement of Facts.

Thereafter, the Petitioner filed a notice of his intention to appeal the Board's decision to Common Pleas Court. This notice of appeal was time-stamped September 9, 1988.

Thus, the notice of appeal was not filed within thirty days of either of the two dates of issuance of the Board's decision, as required by state law. (i.e. July 29, 1988 or August 9, 1988).

The transcript of documents and testimony heard by the board (hereinafter "Transcript") was filed in the common pleas court in one volume on January 12, 1989.

On April 13, 1989, the Respondent filed a motion to dismiss the appeal on the grounds of the Petitioner's failure to timely file the notice of appeal. In support of its motion, the Respondent referenced various exhibits which were in the official transcript of the Board.

On April 20, 1989, the Petitioner filed a memorandum in opposition to the motion to

dismiss. Attached to the memorandum was a photocopy (not an original) of a certified copy of the Board's decision which the Petitioner claimed was the only notice of the decision of the Board which was received by the Petitioner. The Petitioner did not support this assertion by affidavit. Nor did its attorney, Mr. Ellerbrock, attempt to explain how he failed to receive either of the two copies of the decision for which he and his secretary had previously signed certified mail return receipts.

On May 24, 1989, the trial court filed its decision and entry sustaining the Respondent's motion to dismiss.

The Petitioner filed its notice of appeal to the Montgomery County Second District Court of Appeals from the above decision and entry on May 30, 1989.

The parties submitted their briefs to the Court of Appeals, and made oral argument. On January 19, 1990, the Court filed its Opinion, affirming the decision of the Common Pleas Court in dismissing the appeal.

On January 31, 1990 the Court of Appeals filed its final entry, dismissing the appeal.

On March 2, 1990 the Petitioner filed its notice of appeal to the Ohio Supreme Court, but the Petitioner's request was denied on June 13, 1990.

REASONS FOR DENYING THE WRIT

In Mullane v. Hanover B. & T. Co. (1949), 339 U.S. 306, 94 L. Ed. 865, the Court held that:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . The notice must be of such nature as reasonably to convey the required information . . and it must afford a reasonable time for those interested to make their appearance . . . But, if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied . . . But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

In New York v. New York, N.H.& H. RR Co. (1953), 344 U.S. 293, 296, 97 L. Ed. 333 the court held that:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice . . . But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication."

Thus, the court ruled that when the name and address of the party is known, notice by publication is inadequate.

In Moldovan v. Cuyahoga County Welfare Dept. (1986), 25 Ohio St. 3d 293, the state supreme court ruled that when the name and address of the party is known, notice by publication of a final entry of a court in a court-approved legal newspaper is inadequate.

Here, the required notice, in the form of a copy of the Board's decision, was not only sent by certified mail to the Petitioner's counsel; the evidence in the record also establishes that one copy of the decision was actually received by the attorney, and a second copy was actually received by his office secretary.

Section 2505.07 of the Ohio Revised Code provides as follows:

> After the entry of the final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days."

In Farinacci v. Twinsburg (1984), 14 O. App. 3d 20, a board of building and zoning code appeals verbally announced its decision denying a variance, and issued a written decision, signed by its secretary and by its chairman of the board, within one week following the meeting. The Court of Appeals ruled that the board entered its final order, for purposes of perfecting an appeal to the trial court, at the time it sent written notification of its decision to the applicant.

The date on which the Board's decision was entered can be evidenced in numerous ways. It can be time-stamped by a mechanical stamping device upon the written entry, or in the absence of a mechanical stamp, it can be hand-written upon the entry. The manner in which the date of entry is evidenced is unimportant. It matters only that the date of entry be evidenced.

In the instant case, the date of mailing the decision is established as the date of entry,

because, by mailing the decision to the Petitioner, the Board unequivocally evidenced the fact that it regarded its decision as final. This procedure is expressly approved by the court in the Farinacci case, supra.

In the case at bar, §99.15(C) of the Revised Code of General Ordinances of the City of Dayton, Ohio (hereinafter "R.C.G.O.") provides as follows:

> The proceedings at such hearings, including the findings and decision of the board and reasons therefore shall be summarized and reduced to writing and entered as a matter of public record in the office of the Division of Inspectional Services."

The "Decision, Final Order and Entry" of the Board meets the above criteria for making a written summarization of the proceedings. The above provision does not require that the Board's decision and summarization be accomplished by two separate documents. In fact, such a practice could only contribute to bureaucratic delay. The effect of the above provision is to clearly and unequivocally define the decision, final order and entry of

the Board as a public record, and to assure its availability to any person upon request.

The Board's written decision in this case bore all the indicia of finality and was denominated, in bold letters, "Decision, Final Entry and Order." It contained a statement of the status of the case, recorded the presence or absence of Board members and others, it included findings of facts, and it reported the order of the Board, which affirmed the Legal Order. The decision concludes with an order that the case be returned to the inspector for further enforcement.

The decision records the fact that the witnesses testified under oath, and that the decision was approved by a quorum of the Board. The decision is approved and signed by all the members of the Board who participated in it, and the dates of mailing are recorded on it.

The Board did not simply enter its minutes upon the public record and leave it up to the parties or their attorneys to find out about it. Instead, the Board mailed two copies by

certified mail to the attorney for the Petitioner, one copy by certified mail to the statutory agent for the corporate Petitioner, and one copy to Mr. William Kuntz III. When the latter was returned unclaimed, another copy was sent by certificate of mailing. The extraordinary effort which was made by the Board to assure that its final entry actually reached the interested parties far surpassed that ordinary mail service which is almost universally used by the courts of this state and of the United States for the dissemination of final entries.

It cannot be fairly said that this is a procedure calculated to lull a party to sleep while his appeal time runs out. On the contrary, it clearly and unequivocally alerts the party and its counsel that this document officially and finally terminates the consideration of the case by the Board.

In the court of appeals, the Petitioner pointed to the case of Swafford v. Norwood Bd.

of Edu. (1984), 14 Ohio App. 3d 346, to support its argument that the decision of an administrative appeals board is not a final order until the board's minutes are formally recorded in a minute book.

While the Swafford case finds such a procedure acceptable, it does not hold that recordation in a minute book is the only acceptable procedure. Quite to the contrary, the court expresses not only its approval of, but its preference for the procedure which was utilized by the Board in the instant case:

> "While obviously the better practice would be to give prompt notice of such action to all interested parties, and, indeed, judicial notice may be taken that this is customarily done in all well-conducted agencies, the statute does not require such notice since, doubtless, in the usual and customary case, the information is readily available to anyone who desires to read it."

Moreover, it is abundantly clear that the copies reached their destinations in this case, as evidenced by the separate return receipts signed by the Petitioner's counsel and his secretary.

In the memorandum which the Petitioner filed in the trial court opposing the motion to dismiss, the Petitioner's counsel denied having received the copies of the Board's decision for which he and his secretary signed. The record of this case, however, contains no evidence upon which the trial court could have based a finding that he did not receive those copies.

Rule 2.09(b) of the Montgomery County Rules of Practice and Procedure of the Court of Common Pleas (hereinafter "Montg. Co. R.") provides, in relevant part, as follows with regard to motions to dismiss:

> "If the motion requires the consideration of facts not appearing of record, . . . [the party opposing the motion] . . . shall also serve and file copies of all photographs or documentary evidence which he intends to submit in opposition to the motion, in addition to the affidavits required by the Ohio Rules of Civil Procedure."

Thus, the Petitioner had an opportunity to be heard, either by affidavit or by requesting an oral hearing. Because the Petitioner failed to supplement the record with affidavits

supporting its claim that it did not receive a copy of the decision letter, there is no evidence in the record which would have justified the trial court in so finding.

The only evidence which was before the court on the question of whether the decision letter was received were the copies of the certified mail return receipts, which were signed and dated by Mr. Ellerbrock, the Petitioner's counsel, and his secretary, and which were included in the transcript of documents, on file with the trial court.

When confronted with this evidence, the trial court would clearly have abused its discretion if it had not dismissed the case.

In any event, upon the basis of the evidence before the trial court, that court certainly did not abuse its discretion in finding that the Petitioner was notified of the decision of the Board and that the Petitioner did not timely file a notice of appeal from that decision, and the Court of Appeals did not

err in affirming the decision of the trial court.

Wherefore, we respectfully request that the court decline to issue a writ of certiorari herein.

CONCLUSION

This case is not one which raises a question as to whether a form of constructive service of a notice is constitutionally adequate. As we have shown, in this case, the evidence discloses that the Petitioner's legal counsel actually received the notice by certified mail, and signed a return receipt to acknowledge that he received it. Thus, this case raises no issues of federal constitutional proportions.

This case involves only the question of whether or not the Petitioner herein has complied with the clear and unequivocal procedural requirements of city ordinances, state laws and local rules of court.

Accordingly, this is not an appropriate case for the issuance of a writ of certiorari because this case does not question the validity of a statute of the United States or of a state, and because the facts of this case clearly and unequivocally demonstrate that no title, right, privilege, or immunity has been violated.

Accordingly, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. ANTHONY SAWYER
City Attorney
Counsel of Record

Steven R. Milby
Senior Attorney
101 West Third Street
P.O. Box 22
Dayton, Ohio 45401
Tel. (513) 443-4100
Fax. (513) 443-3628

Counsel for Respondent
City of Dayton, Ohio